

1 RENE L. VALLADARES
2 Federal Public Defender
3 Nevada Bar No. 11479
4 DAVID ANTHONY
5 Assistant Federal Public Defender
6 Nevada Bar No. 7978
7 david_anthony@fd.org
8 BRAD D. LEVENSON
9 Assistant Federal Public Defender
10 California Bar No. 166073
11 brad_levenson@fd.org
12 TIMOTHY R. PAYNE
13 Assistant Federal Public Defender
14 Ohio Bar No. 0069329
15 tim_payne@fd.org
16 411 E. Bonneville, Ste. 250
17 Las Vegas, Nevada 89101
18 (702) 388-6577
19 (702) 388-5819 (Fax)

11 Attorneys for Zane M. Floyd

12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 ZANE M. FLOYD,

15 Plaintiff,

16 v.

17 CHARLES DANIELS, Director, Nevada
18 Department of Corrections, et al.,

19 Defendants.

20 Case No. 3:21-cv-00176-RFB-CLB

21 REPLY TO OPPOSITION TO
22 MOTION FOR STAY OF EXECUTION
23 (DEATH PENALTY CASE)

EXECUTION WARRANT SOUGHT
FOR THE WEEK OF JULY 26, 2021

1 I. INTRODUCTION

2 The Nevada Department of Corrections (NDOC) spent months delaying
3 litigation and discovery on Zane Floyd's Section 1983 complaint, arguing that
4 nothing could happen until their execution protocol was "finalized." NDOC refused
5 to provide even the names of the drugs under consideration, let alone the dosages
6 and sequencing of those drugs. NDOC has finally released the protocol, along with
7 drug invoices, and a declaration from pharmacy director Linda Fox. The documents
8 make clear that NDOC has been considering these same drugs for years. Yet, only
9 two weeks after their disclosures, NDOC is opposing a stay, maintaining that
10 Floyd's execution must now proceed as quickly as possible. Incredibly, NDOC insists
11 that this Court "must deny Floyd's Motion without providing additional time or any
12 further hearings," and complains that Floyd has failed to gather enough evidence to
13 support the unconstitutionality of the execution protocol. ECF No. 106.¹ Floyd has
14 not had years to gather evidence. He has had days. In that short time, Floyd's
15 experts have opined that Nevada's protocol presents a substantial risk of
16 unconstitutional pain and suffering. But a stay is necessary to allow Floyd to
17 memorialize his expert's opinions in reports, present his experts to this Court, and
18 receive full consideration of the constitutionality of Nevada's novel execution
19 protocol.²

20

21 ¹ Defendant Ihsan Azzam maintains an injunction is inappropriate as to him
22 but otherwise takes no position on Floyd's motion. ECF No. 105.

23 ² Floyd proposes an expedited schedule, which aligns with litigation
 schedules over novel protocols in other jurisdictions, along with the defendants' own

1 II. ARGUMENT

2 NDOC challenges Floyd's arguments concerning a stay of execution, the All
 3 Writs Act,³ and judicial estoppel. But their arguments, in addition to being
 4 unpersuasive, highlight the imbalance at the heart of Floyd's motion—NDOC for
 5 years has known about these drugs, withheld that information from Floyd for
 6 months (and perhaps years) after the State started the process of purchasing
 7 execution drugs,⁴ and now it complains that Floyd has less information than they
 8 do. A stay of execution is an equitable remedy, *see Towery v. Brewer*, 672 F.3d 650,
 9 657 (9th Cir. 2012); *Nooner v. Norris*, 491 F.3d 804, 807–08 (8th Cir. 2007), and
 10 Floyd has satisfied each of the factors required.

11 A. **Floyd has satisfied the requirements for a preliminary injunction
 and stay of execution.**

12 NDOC first argues that Floyd has not established the requirements for a
 13 preliminary injunction and stay of execution. ECF No. 107 at 9. As an initial note,
 14 NDOC ignores Floyd's crucial interest in not being executed in violation of the
 15 Eighth Amendment's prohibition on cruel and unusual punishment. *See*
 16 *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring);
 17

18
 19 proposal. *See* ECF No. 31-1, 31-2, 31-3, 31-4, 31-5; *see also* ECF No. 92 (defendants'
 20 proposal of 125 days for discovery, disclosures, and pretrial motions).

21 ³ Due to page limitations, Floyd is not addressing the All Writs Act argument
 22 in this reply but stands by the argument found in the motion.

23 ⁴ NDOC faults Floyd for not waiting for final release of the protocol to file his
 24 Section 1983 complaint. ECF No. 107 at 8 n.47. Until NDOC informed Floyd of the
 25 unavailability of midazolam, ECF No. 22 at 7–10; ECF No. 23 at 7–10; ECF No. 28,
 26 Floyd was operating under the assumption that the State would not seek his
 27 execution without an execution protocol or execution drugs.

1 *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982); *Towery*, 672 F.3d at 661.

2 Floyd has additionally satisfied the remaining factors.

3 **1. Likelihood of success on the merits**

4 Under Supreme Court precedent, Floyd must make two showings to succeed
 5 on his Eighth Amendment claim: (1) the execution protocol entails a “substantial
 6 risk of serious harm”; and (2) there are “feasible, readily implemented” alternatives
 7 that “significantly reduce a substantial risk of severe pain.” *Glossip v. Gross*, 576
 8 U.S. 863, 877 (2015) (cleaned up). NDOC challenges both aspects of the test. ECF
 9 No. 107 at 9–21.⁵ But NDOC is incorrect on both the facts and the law underlying
 10 Floyd’s argument.⁶

11 **a. Floyd has shown the execution protocol entails a
 substantial risk of causing serious harm.**

12 NDOC first challenges Floyd’s argument that the drugs in the execution
 13 protocol, separately and together, present an unconstitutional risk of harm. ECF
 14 No. 107 at 9–21. That argument boils down to two contentions: (1) Floyd has
 15 introduced insufficient evidence; and (2) this Court should accept without question
 16 NDOC’s expert’s opinions. Each contention is faulty.

18 ⁵ NDOC notes that three of the six potential drugs were used in a recent
 19 execution in Nebraska (fentanyl, potassium chloride, and cisatracurium). Because
 20 that execution was of a volunteer, there was no litigation concerning the
 constitutionality of Nebraska’s protocol. And, critically, that protocol did not include
 ketamine as the anesthetic.

21 ⁶ NDOC additionally ignores that the factors governing stays and preliminary
 22 injunctions are flexible, and “where the balance of hardships tips sharply towards
 23 the plaintiff, a plaintiff need only show serious questions going to the merits, rather
 than likelihood of success on the merits, to warrant preliminary injunctive relief.”
Roman v. Wolf, 977 F.3d 935, 941 (9th Cir. 2020) (cleaned up); *see Towery*, 672 F.3d
 at 657; *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir. 2005).

1 Turning first the evidence underlying Floyd’s motion, NDOC relies on the
2 absence of any declarations from medical experts or citations to medical journals.
3 ECF No. 107 at 9–11. Floyd, in accordance with this Court’s scheduling order, filed
4 his renewed motion for a stay *nine days* after NDOC provided the final protocol.⁷
5 This was insufficient time to complete all the steps necessary to obtain final expert
6 reports. *See Fed. R. Civ. P. 26(a)(2)* (distinguishing expert reports from initial
7 disclosures under discovery rules). But Floyd was able to begin that process,
8 learning sufficient information to show an unconstitutional risk of harm from
9 Nevada’s protocol. Specifically, fentanyl and alfentanil carry known risks of chest
10 wall rigidity, especially at the high doses stated in the execution protocol. Both
11 drugs are too short acting to effectively prevent pain from the other drugs in the
12 protocol. Fentanyl, alfentanil, and ketamine all interfere with consciousness checks,
13 leading to continuation of the execution despite Floyd’s awareness. Ketamine also
14 carries significant side effects: psychosis, laryngospasms, excessive secretions, and
15 vomiting. And ketamine as an anesthetic risks incomplete unawareness, leading to
16 excruciating pain from the following two drugs, cisatracurium and potassium
17 chloride (or potassium acetate). *See Baze v. Rees*, 553 U.S. 35, 53 (2008) (“It is
18

19 ⁷ NDOC contends Floyd should have started investigating ketamine at the
20 merest suggestion that it was under consideration. ECF No. 107 at 11. But NDOC is
21 incorrect that Floyd knew about ketamine “for several years.” *Id.* It was Floyd’s
22 understanding that ketamine was *excluded* as a potential drug for Scott Dozier’s
23 execution, and, through the hearing on May 20, 2021, counsel for NDOC was still
asserting in court that the final drugs had not been determined. ECF No. 81 at 21. In
the face of NDOC’s refusal to confirm or deny that they planned to include ketamine
in the final protocol, *see* ECF No. 49 at 92, their position that Floyd should investigate
based on hints and conjecture is untenable.

1 uncontested that, failing a proper dose of sodium thiopental that would render the
 2 prisoner unconscious, there is a substantial, constitutionally unacceptable risk of
 3 suffocation from the administration of [the paralytic] and pain from the injection of
 4 potassium chloride.”). These risks were detailed in Floyd’s motion. ECF No. 98 at
 5 13–17. And, with these drugs combined, NDOC’s protocol presents a substantial
 6 risk that Floyd will be aware and in extreme pain during his execution.

7 NDOC ignores these risks, instead asking Floyd and this Court to accept its
 8 expert declarations as proven fact. ECF No. 108 at 11–21.⁸ But there is good reason
 9 to doubt those expert declarations.⁹ Daniel Buffington is a clinical pharmacologist
 10 and toxicologist, not a medical doctor. ECF No. 108-8 at 3. To the extent he opines
 11 on the medical aspects of Nevada’s protocol, he is operating outside his area of
 12 expertise.¹⁰

13 Jeffrey Petersohn agrees that fentanyl and alfentanil cause chest wall
 14 rigidity, “which may make it more difficult for an individual to breathe.” ECF No.
 15 108-6 at 6. As for ketamine, he does not address the fact that ketamine’s side effects
 16 are lessened in clinical settings because of the administration of other drugs, not

17
 18 ⁸ It is unclear from the expert declarations whether NDOC began its
 19 consultations with these experts before disclosing the final execution drugs to Floyd.
 20 What is clear, however, is that NDOC has been considering these same execution
 21 drugs for years. *See* ECF No. 108-4.

22 ⁹ NDOC additionally asserts that ketamine is equivalent or better than other
 23 alternatives. ECF No. 107 at 10. Ketamine, a dissociative anesthetic, is not in the
 same class of drugs as barbiturates like pentobarbital.

24 ¹⁰ It is Floyd’s understanding that Mr. Buffington was excluded from testifying
 25 in Ohio on lethal injunction matters. *See In re Ohio Execution Protocol Litigation*,
 26 2:11-cv-1016, ECF No. 2408.

1 included in Nevada's protocol. *Id.* at 8–9. And he ignores the concerns with
2 consciousness checks after fentanyl, alfentanil, and ketamine, *Id.* at 9–10, which
3 substantially increase the risk of unconstitutional pain and suffering. He concludes
4 by asserting “it is not medically foreseeable that the NDOC Protocol would be
5 nonlethal.” *Id.* at 10. But this misses the point. There are many ways to execute an
6 inmate; not all of those ways are constitutional.

7 Finally, Steve Yun, who specializes in pediatric dentistry, agrees chest wall
8 rigidity occurs with fentanyl and alfentanil, but he asserts that occurs after
9 unconsciousness. ECF No. 108-7 at 3. He bases that assertion, however, only on his
10 clinical practice and one study. *Id.* Floyd's experts dispute this assertion, along with
11 the assertion that even high doses of fentanyl will reliably produce unawareness.
12 And, like Petersohn, Yun ignores that fentanyl, alfentanil, and ketamine interfere
13 with consciousness checks.¹¹

14 In sum, NDOC insists this Court deprive Floyd of any opportunity to
15 challenge their experts' conclusions and instead accept those conclusions as fact.
16 However, their disputed conclusions do not undermine the risks Floyd presented in
17 his motion for a stay, which show a substantial risk of unconstitutional pain and
18 suffering.

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¹¹ It is Floyd's understanding that Dr. Yun was likewise excluded from
23 testifying in Ohio on lethal injunction matters. See *In re Ohio Execution Protocol
Litigation*, 2:11-cv-1016, ECF No. 2353.

1 **b. Floyd has presented adequate alternatives under
2 Supreme Court precedent.**

3 In his motion for a stay, Floyd presented two alternatives: (1) a firing squad;
4 and (2) a one-drug protocol using a barbiturate. NDOC opposes these alternatives
5 because Nevada law provides only for lethal injection, and NDOC has been unable
6 to procure a barbiturate. ECF No. 107 at 19–20.¹² Neither of these facts matter—
7 the Supreme Court has made clear that “[a]n inmate seeking to identify an
8 alternative method of execution is not limited to choosing among those presently
9 authorized by a particular State's law. ... So, for example, a prisoner may point to a
10 well-established protocol in another State as a potentially viable option.” *Bucklew v.*
11 *Precythe*, 139 S. Ct. 1112, 1128 (2019).¹³ Both of Floyd’s proposed alternatives are
12 well-established in other jurisdictions. Four states currently authorize execution by
13 firing squad, Mississippi, Oklahoma, South Carolina, and Utah. And several
14 jurisdictions, including Texas, Georgia, and the federal government, have recently
15 used pentobarbital in carrying out executions.¹⁴

16

17 ¹² NDOC adds that, because a firing squad is unavailable in Nevada, Floyd’s
18 challenge is properly brought in a habeas action, not a Section 1983 lawsuit. That
19 area of law is unsettled, *see Nance v. Comm'r, Georgia Dep’t of Corr.*, 981 F.3d
20 1201, 1205–11 (11th Cir. 2020), but, out of an abundance of caution, Floyd has
challenged Nevada’s protocol in his habeas proceedings, *Floyd v. Gittere*, No. 2:06-
cv-00471 (D. Nev.). The Attorney General’s office argued in response to Floyd’s
habeas filings that the habeas case was inappropriate for this challenge.

21 ¹³ NDOC relies on *In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir.
22 2017), ECF No. 107 at 20, a decision released two years before *Bucklew*.

23 ¹⁴ NDOC argues that pentobarbital is unavailable through purchase by
Cardinal Health. ECF Nos. 108-04 at 4; 108-5 at 4. However, compounding
pentobarbital is relatively easy, a fact even NDOC’s own expert, Mr. Buffington,
testified to in recent litigation in the South.

1 NDOC additionally complains that “Floyd fails to present any medical or
 2 scientific evidence comparing the Nevada Protocol to either firing squad or the one-
 3 drug alternative.” ECF No. 107 at 20.¹⁵ Again, Floyd, because of the defendants’
 4 actions, had less than ten days after the protocol’s disclosure to file his renewed
 5 motion for a stay. But that was sufficient time to learn of significant, serious risks
 6 inherent in Nevada’s protocol, which are significantly reduced by Floyd’s proposed
 7 alternatives.

8 **2. Balance of the equities**

9 NDOC next argues that the balance of the equities weigh in its favor, not
 10 Floyd’s. ECF No. 107 at 21–22. This is incorrect. The public has an interest in
 11 executions proceeding constitutionally, not in a rushed manner designed to deprive
 12 condemned inmates of any meaningful litigation. *See In re Ohio Execution Protocol*
 13 *Litig.*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012), *case dismissed* (Mar. 20, 2012);
 14 *Coe v. Bell*, 89 F. Supp. 2d 962, 966 (M.D. Tenn. 2000), *vacated on mootness*
 15 *grounds*, 230 F.3d 1357 (6th Cir. 2000) (unpublished table disposition); *see also*
 16 *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (“[I]t is
 17 always in the public interest to prevent the violation of a party’s constitutional
 18 rights.”), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
 19 And although NDOC correctly points out that it did not seek the execution order in

20 ¹⁵ That other plaintiffs in other states challenge one-drug protocols, *see* ECF
 21 No. 107 at 20, does not mean it does not present a significantly improved
 22 alternative over Nevada’s current protocol. Floyd reiterates that he presents
 23 alternatives because they significantly reduce the risk of pain as required by
 Supreme Court precedent, not because those alternatives are completely free from
 risk.

1 this case, ECF No. 107 at 22, Floyd's point remains the same: NDOC, not Floyd and
2 not the Clark County District Attorney's office, delayed litigation and discovery in
3 this case, undermining any interest they have in a speedy execution. *See Towery*,
4 672 F.3d at 661; *see also Landrigan v. Brewer*, No. 10-02246, 2010 WL 4269559, at *9
5 (D. Ariz. Oct. 25, 2010) (criticizing defendants for "withholding all evidence regarding
6 the drug," while at the same time opposing stay of execution), *aff'd*, 625 F.3d 1144 (9th
7 Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 455 (2010)); *cf. Pizzuto v. Tewalt*, 997 F.3d
8 893, 902 (9th Cir. 2021) (expressing concern with states withholding information about
9 execution protocol "to minimize judicial scrutiny").

10 **B. Judicial estoppel is appropriate in this case.**

11 NDOC next argues that judicial estoppel is inappropriate because they have
12 consistently argued against a stay. ECF No. 107 at 23. But its response itself
13 reinforces why judicial estoppel is appropriate here. While "NDOC has consistently
14 maintained that Floyd is not entitled to stay or injunction," *id.*, they *at the same*
15 *time* have unnecessarily delayed this case. NDOC has had the drugs for Floyd's
16 execution for years. It ordered those drugs for the specific purpose of using them in
17 an execution. Meanwhile, it averred in this Court that the protocol was not final,
18 and the drugs were unknown. It was only after releasing the protocol—containing
19 those same drugs—that NDOC changed its mind about delay. It should not be
20 permitted to benefit from this change at the expense of Floyd's constitutional rights.
21 *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001); *Rissetto v. Plumbers &*

22 *Steamfitters Loc.* 343, 94 F.3d 597, 600 (9th Cir. 1996).

1 **C. Exhaustion is not required.**

2 Under the Prison Litigation Reform Act of 1995 (PLRA), “a prisoner need
 3 exhaust only available administrative remedies” that challenge prison conditions.
 4 *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850, 1856-57 (2016) (internal quotations
 5 omitted) (emphasis added). Because Floyd does not challenge a prison condition and
 6 NDOC lacks an available exhaustion remedy, he is not required to exhaust.

7 **1. Floyd does not challenge prison conditions**

8 Here, exhaustion does not apply as Floyd does not seek to challenge a prison
 9 condition, but rather disputes the constitutionality of lethal drugs. This matter
 10 transcends far beyond issues arising within the prison walls, and thus cannot
 11 genuinely be characterized as challenging “prison conditions.”¹⁶ Moreover, the cases
 12 cited by defendants in support of their argument are wholly different than the facts
 13 at hand, and thus can be distinguished, as they discuss exhaustion concerns
 14 brought under challenges to actual prison conditions. For example, *Ross v. Blake*
 15 discussed an inmate’s 42 U.S.C. § 1983 suit against prison guards for attacking him
 16 while in custody. *Id* at 1855. Similarly, in both *Swain* and *Valentine* courts
 17 considered complaints challenging lack of social distancing and safety measures
 18 used by prisons to protect inmates during the COVID-19 pandemic. *Swain v.*
 19 *Junior*, 958 F.3d 1081, 1085-87 (11th Cir. 2020); *Valentine v. Collier*, 956 F.3d 797,
 20 799-800 (5th Cir. 2020). Unlike Floyd, the issues in *Ross*, *Swain*, and *Valentine* all

21
 22 ¹⁶ Defendants also characterize Floyd’s challenge as falling outside the
 23 purview of prison conditions. *See Opp.* at 8 fn. 47 (stating Floyd’s motion only seeks
 to challenge “the underlying legally and constitutionally imposed sentence.”).

1 evidence an unequivocal challenge to conditions arising out of the prison
2 environment. Floyd, on the other hand, challenges several issues surrounding the
3 adequacy of lethal drugs, a circumstance that is entirely separate from a prison
4 condition and does not arise out of the state of being in the prison. For those
5 reasons, and others detailed below, exhaustion is not required.

6 **2. No administrative remedy is available to Floyd**

7 Even if Floyd were challenging prison conditions, he still would not be
8 required to exhaust administrative remedies as none are available to him, and any
9 attempt to exhaust would be futile.

10 As an initial matter, noticeably, defendants fail to point to what exact
11 administrative remedy Floyd should have pursued before pursuing litigation. *See*
12 *Ross*, 136 S. Ct. at 1855, 1860 (detailing each step of the administrative process
13 available to inmates with complaints similar to those alleged). This is likely so
14 because no cognizable administrative remedy is available to Floyd.

15 “An administrative procedure is unavailable when (despite what regulations
16 or guidance materials may promise) it operates as a simple dead end—with officers
17 unable or consistently unwilling to provide any relief to aggrieved inmates.” *Id.* at
18 1859. Any attempt by Floyd to exhaust his challenges would have been futile
19 because officers are unable to provide the type of relief Floyd requests, namely a
20 finding that the lethal drugs proposed violate federal law and an injunction to
21 prevent their use. Indeed, in order to adequately litigate his claims Floyd had to
22 name several defendants besides NDOC, further evidencing NDOC’s incapability to

1 address these issues administratively. Accordingly, because no administrative
2 remedy is available to Floyd he is not required to exhaust anything.

3 **III. CONCLUSION**

4 NDOC concedes Floyd filed his Section 1983 lawsuit at the earliest possible
5 opportunity. ECF No. 107 at 8 n.47. But it simultaneously maintains Floyd has filed
6 too late for meaningful litigation. Accepting this position would deprive Floyd of any
7 opportunity to litigate Nevada's novel execution protocol. That cannot be true.
8 Because Floyd has shown a likelihood of success on the merits, and the balance of
9 equities weighs strongly in his favor, Floyd is entitled to a stay of execution to
10 provide enough time for full litigation, for the first time, of Nevada's execution
11 protocol.

12 DATED this 25th day of June, 2021.

13 Respectfully submitted
14 RENE L. VALLADARES
Federal Public Defender

15 /s/ David Anthony
DAVID ANTHONY
16 Assistant Federal Public Defender

17 /s/ Brad D. Levenson
BRAD D. LEVENSON
18 Assistant Federal Public Defender

19 /s/ Timothy R. Payne
TIMOTHY R. PAYNE
20 Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with LR IC 4-1(c) of the Local Rules of Practice, the undersigned hereby certifies that on this 25th day of June, 2021 a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR STAY OF EXECUTION, was filed electronically with the United States District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

D. Randall Gilmer
Chief Deputy Attorney General
Office of the Nevada Attorney General
drgilmer@ag.nv.gov
Crane Pomerantz, Esq.
Nadia Ahmed, Esq.
SKLAR WILLIAMS PLLC
cpomerantz@sklar-law.com
nahmed@sklar-law.com

/s/ Celina Moore
An Employee of the
Federal Public Defenders Office,
District of Nevada